12-707-cv (L)

12-791-cv (XAP)

United States Court of Appeals for the Second Circuit

ENTERGY NUCLEAR VERMONT YANKEE, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.,

Plaintiffs – Appellees – Cross-Appellants,

v.

PETER SHUMLIN, in his official capacity as Governor of the State of Vermont; WILLIAM SORRELL, in his official capacity as Attorney General of the State of Vermont; and JAMES VOLZ, in his official capacity as a member of the Vermont Public Service Board, JOHN BURKE, in his official capacity as a member of the Vermont Public Service Board, and DAVID COEN, in his official capacity as a member of the Vermont Public Service Board,

Defendants – Appellants – Cross-Appellees.

On Appeal from the United States District Court for the District of Vermont

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, IOWA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, AND UTAH AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

Table of Authorities (cont'd)

Cases (cont'd) **Page**

Table of Authorities (cont'd)

INTEREST OF THE AMICI

The States of New York, Connecticut, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, and Utah submit this brief as amici curiae, urging this Court to reject the district court's preemption analysis, which would severely limit the scope of States' traditional authority to regulate power utilities, including nuclear power plants. As explained below, the Supreme Court has interpreted the Atomic Energy Act of 1954 ("AEA"), Act of Aug. 30 1954, ch. 1073, 68 Stat. 919 (1954) (*codified as amended at* 42 U.S.C. §§ 2011-2281), to establish a carefully delineated division of responsibilities between States and the federal government. The Supreme Court has referred to this division of responsibilities as a "dual regulation of nuclear-powered electricity generation," in which the federal government regulates the nuclear safety aspects of nuclear facilities, and States remain free to regulate other aspects. *Pac. Gas and Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n* ("*PG&E*"), 461 U.S. 190, 211-212 (1983). In particular, States retain their traditional authority to regulate them as electrical utilities.

The amici States have an interest in preserving the "dual regulation" structure established by the Atomic Energy Act. A ruling that fails to respect that structure, like the district court's opinion in this case, threatens the States' ability to exercise their authority and responsibility to oversee non-safety-related aspects of nuclear power generation.

While nuclear safety issues are the exclusive province of federal authorities, nuclear power plants present many other important issues that States are empowered to address. For example, the decision whether to authorize the construction and operation of a nuclear power plant—a decision that is within the core of the States' traditional authority—requires the State to assess the long-term economic and environmental costs and benefits to the public that will follow from authorizing any particular facility. State regulators must often assess whether there are practical alternatives to any given proposal that would offer better or more cost-effective ways of providing power to citizens of the State. Moreover, States must be alert to the significant costs associated with decommissioning a nuclear power facility; a company authorized to operate a nuclear facility must be financially

stable enough to remain in existence and make good on its obligations to decommission a facility and restore the site. If a company that operates a nuclear facility goes bankrupt or collapses, taxpayers may be forced to bear the cost of decommissioning; there is a sense in which nuclear utilities are "too big to fail."

Like any other utility, nuclear power plants present significant policy challenges to State governments. The Atomic Energy Act makes the federal government responsible for ensuring that nuclear plants are safe; but it leaves States with responsibility for all of the other policy choices that relate to the operation and authorization of nuclear facilities. Although the amici States do not have statutes with the same structure as Vermont's statutes, we submit this brief to alert this Court to the significant problems the district court's analysis would cause if it were endorsed as the law of this Circuit. Because that analysis is mistaken in several important respects, and because it undermines States' ability to regulate nuclear power plants *qua* utilities, this Court should reject it.[1]

[1] Amici do not address any other issues presented by this appeal.

QUESTIONS PRESENTED

1. The federal Atomic Energy Act preempts state laws that regulate the nuclear safety of nuclear power plants, but it does not preempt state laws that regulate nuclear power plants in other respects. Can a state law which on its face has a valid and non-preempted purpose be found preempted on the basis of statements about nuclear safety made by some individual legislators and non-legislators?

2. Does the Atomic Energy Act preempt state laws that allow a nuclear facility's authorization to sunset without requiring further findings by the state legislature?

BACKGROUND

Plaintiffs Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively, "Entergy"), own and operate the Vermont Yankee Nuclear Power Station ("Vermont Yankee") in Vernon, Vermont. (Joint Appendix ("J.A.") 1811 ¶ 13.) Vermont Yankee operates under a license from the federal Nuclear Regulatory Commission ("NRC") and a certificate of public good issued by

Vermont's Public Service Board. *See* Vt. Stat. Ann. tit. 30, §§ 102, 203, 231, 248.

In 2005, when Entergy increased Vermont Yankee's generating capacity, the Vermont Legislature[2] passed a statute known as "Act 74," which that approved the construction of a dry-cask storage facility for additional spent nuclear fuel.[3] *See* 2005 Vt. Acts & Resolves No. 74 (reproduced at Special Appendix ("S.A.") 136-145), *codified at* Vt. Stat. Ann. tit. 10, §§ 6521-6523. Entergy had sought approval for the storage facility only until 2012, when its state approval to operate Vermont Yankee expired; accordingly, Act 74 required Entergy to obtain further legislative approval to store spent fuel generated after 2012. *See* Vt. Stat. Ann. tit. 10, § 6522(c)(4) (S.A. 139-140.)

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[2] The Vermont legislature is bicameral, consisting of a House of Representatives and a Senate; collectively, the legislature is sometimes referred to as the "General Assembly" and sometimes as the "Legislature."

[3] Spent nuclear fuel is transferred from the reactor to a pool where it cools down for at least one year. Once cooled, it may be transferred to dry "casks"—containers in which the spent fuel is surrounded by inert gas—for temporary storage. *See* NRC, *Dry Cask Storage*, http://www.nrc.gov/waste/spent-fuel-storage/dry-cask-storage.html (last visited June 7, 2012). Currently, there are no permanent disposal facilities in the United States for high-level nuclear waste. NRC, *Radioactive Waste: Production, Storage, Disposal*, http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0216/ (last visited June 7, 2012).

In 2006, the Vermont legislature passed another statute, known as "Act 160," which requires legislative approval before the Public Service Board may issue a renewed certificate of public good for continued operation of a nuclear power plant in the state. *See* 2006 Vt. Acts and Resolves No. 160 (reproduced at S.A. 128-135), *codified at* Vt. Stat. Ann. tit. 30, § 248(e)(1), (e)(2), *and id.* § 254. The main effect of Act 160 is to provide for the participation of the legislature—rather than just the Public Service Board—in the decision whether to re-authorize Vermont Yankee. (S.A. 128 §1(a).) Act 160 also calls for studies and a public engagement process to gather information and guide the work of the Board and the Legislature." Vt. Stat. Ann. tit. 30, § 254. In particular, it directs Vermont's Public Service Department to study and encourage public discussion of issues like the long-term economic and environmental benefits, risks, and costs of operating Vermont Yankee; whether there are practical alternatives that might be more cost-effective, or otherwise better promote the general welfare; whether there are adequate plans for guardianship of nuclear waste before it is removed from the site; and whether there is adequate assurance of sufficient funds to close the facility when it is time to do so. *Id.*

In 2010, the Vermont Senate debated a bill that would have provided legislative approval for Vermont Yankee to operate beyond 2012. The bill failed by a vote of 26-4, with opponents citing concerns that Entergy was in the process of becoming "a debt-ridden, highly leveraged company that does not make economic sense" (J.A. 1577 (Sen. Brock)), which created a risk that Vermont taxpayers could eventually bear the financial burden of any decommissioning. (See Vermont Br. at 17-19.)

In 2011, Entergy filed this action under 42 U.S.C. § 1983, claiming, *inter alia*, that Acts 74 and 160 are preempted by the Atomic Energy Act. (J.A. 1807, 1832-1835.) In January 2012, after a bench trial, the district court issued a decision and order granting plaintiffs a permanent injunction barring defendants "from enforcing Act 160 by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down after March 21, 2012 because it failed to obtain legislative approval (under Act 160) for a Certificate of Public Good for continued operation." (S.A. 100.) It also issued a permanent injunction barring defendants from enforcing Act 74 by bringing an enforcement action to compel Vermont Yankee to shut down because it

failed to obtain a certificate of public good authorizing it to store spent nuclear fuel. (S.A. 101.) The Court also issued an injunction relating to dormant Commerce Clause claims that are not addressed in this brief.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's application of preemption principles. *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010) (per curiam).

ARGUMENT

THE DISTRICT COURT'S ANALYSIS OF ATOMIC ENERGY ACT PREEMPTION DID NOT APPLY THE STANDARDS REQUIRED BY SUPREME COURT PRECEDENT

The district court failed to apply the proper standards for determining whether a state statute is preempted by the Atomic Energy Act. The Supreme Court has established that while federal law preempts the field of nuclear safety, States maintain their authority to regulate all other aspects of nuclear facilities' operation, and to decide whether to authorize construction or continued operation of such facilities. *PG&E*, 461 U.S. at 205. State laws may thus be preempted if their *purpose* is to protect against nuclear safety hazards, but *PG&E* established that preempted purpose should be inferred only from the laws themselves, not from an inquiry into the "true motive" of the legislators. *Id*. at 216. The Supreme Court has also suggested that state laws may be preempted if they have the *effect* of regulating within the preempted field of nuclear safety. *English v. Gen. Elec.*, 496 U.S. 72 (1990). But a preempted effect of this kind will not be found unless the state law has a substantial and direct effect on the decisions that operators of nuclear facilities make on matters of radiological safety. *Id*.

at 85. Nor, under *PG&E*, is a State law preempted merely because it allows the State to deny authorization to a nuclear facility. 461 U.S. at 207.

Thus, as the Ninth Circuit recognized in *United States v. Manning*, 527 F.3d 828, 836 (9th Cir. 2008), the Atomic Energy Act preempts state laws only if their purpose is to regulate nuclear safety or they directly and substantially affect decisions about nuclear safety. Because the district court's opinion disregarded these principles, it should be reversed.

"Traditionally, there has been a presumption against preemption with respect to areas where states have historically exercised their police powers." *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). Regulation of power utilities, including facilities that use nuclear power to generate electricity, is an area in which this presumption applies. The Supreme Court held in *PG&E* that States are entitled to the presumption against preemption when they regulate nuclear facilities *qua* electricity-producing utilities: because the regulation of power utilities is "a field which the States have traditionally occupied," the analysis of preemption in this area "start[s]

with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *PG&E*, 461 U.S. at 206 (quotations omitted). This area of traditional state authority includes questions relating to the "[n]eed for new power facilities, their economic feasibility, and rates and services." *Id*. at 205.

Although states have broad authority to regulate nuclear power facilities *qua* electricity-producing utilities, one aspect of nuclear power facilities is exclusively a federal matter. The Atomic Energy Act gives to the Nuclear Regulatory Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." *PG&E*, 461 U.S. at 207. Federal authorities maintain "complete control of the safety and 'nuclear' aspects of energy generation." *Id*. at 212. Thus, States may not regulate to protect against nuclear safety hazards.

But federal power to regulate the safety aspects of nuclear power plants does not imply federal power—much less exclusive federal power —to regulate other aspects of nuclear power plants. Congress "intended that the federal government should regulate the radiological safety

aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *PG&E*, 461 U.S. at 205. States retain the power to deny authorization for construction or continued operation of a nuclear power plant, or to determine "the type of generating facilities to be licensed," *id.* at 212, on a number of grounds.

Federal authorities have recognized "the primacy and expertise of the States in the area of energy planning." *Environmental Review for Renewal of Operating Licenses*, 59 Fed. Reg. 37,724, 37,726 (July 25, 1994). "The NRC acknowledges the primacy of State regulators and utility officials in defining energy requirements and determining the energy mix within their jurisdictions." *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28,467, 28,468 (June 5, 1996); *see* J.A. 796 (NRC report stating that "the NRC does not have a role in the energy-planning decisions of state regulators and licensee officials."). In particular, the States may "exercise their traditional authority over the need for additional

generating capacity"—that is, to decide whether new facilities should be built and operated. *PG&E*, 461 U.S. at 212. Similarly, when States make "the final decision on whether or not to *continue* operating [a] nuclear plant," they may consider factors related to energy-planning policy, such as "economics, energy reliability goals, and other objectives over which [they] may have jurisdiction." 61 Fed. Reg. 28,467 at 28,463 (emphasis added).

States considering a proposal to operate or re-authorize a nuclear facility may also assess the operator's "financial qualifications and capabilities," and make decisions about whether to authorize construction and operation on the basis of that assessment. *PG&E*, 461 U.S. at 208. States' authority to regulate nuclear facilities *qua* utilities also includes the authority to assess the "reliability" and "cost" of those facilities, and to regulate them on the basis of those "and other related state concerns." *Id.* at 205.

The Atomic Energy Act thus creates what the Supreme Court has called a "dual regulation of nuclear-powered electricity generation." *PG&E*, 461 U.S. at 211-212. This "dual regulation" structure—with nuclear safety as the province of the federal government, and all other

matters, including the decision whether to construct a given plant, as the province of the States—is codified in the Act itself, which states: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). *See also* 42 U.S.C. § 2018 ("Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities.").

PG&E established standards that apply to claims that a State law is preempted by virtue of its purpose—that is, where a plaintiff claims that the law's purpose is to regulate against radiological safety hazards. Among these standards is the principle that courts analyzing a preempted-purpose claim must simply determine "whether there is a non-safety rationale for [the challenged law]." *PG&E*, 461 U.S. at 213. They "should not become embroiled in attempting to ascertain [the State's] true motive." *Id.* at 216.

The Supreme Court suggested in two cases that a state law may be preempted even where its purpose is not to regulate nuclear safety, if

the law has sufficiently direct and substantial effects within the preempted field. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (finding no federal preemption of a state damages award); *English*, 496 U.S. at 78–79. But neither of these cases held that a state law was preempted. Indeed, the Supreme Court has never found a state law preempted by the Atomic Energy Act. And *English*, which sets out the standards that apply to claims of effects-based preemption, makes clear that plaintiffs seeking to show preemption under the Act must carry a heavy burden. Rather than simply determining whether a state law has effects on nuclear safety, courts analyzing an effects-preemption claim must instead determine whether the state law has "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English,* 496 U.S. at 85.

The district court in this case did not apply these standards, substituting for each prong of the analysis a novel and unsupportable approach which, if adopted, would undermine the carefully delineated "dual regulation" structure of preemption under the Atomic Energy Act. Because the district court's approach fails to respect the substantial

areas in which states retain power to regulate nuclear utilities, the district court's preemption analysis should be rejected.

A. The District Court Erred in Analyzing the Purpose of Vermont's Laws

The district court's analysis of the question whether Vermont's statutes are preempted by virtue of their purpose was flatly inconsistent with the analysis set forth in *PG&E*, in two respects. First, rather than analyzing Vermont's statutes to determine whether there is "a non-safety rationale" for the statutes, *PG&E*, 461 U.S. at 213, the district court engaged in a detailed analysis of the motives of individual legislators, and the motives of non-legislators who participated in the legislative process. But *PG&E* makes clear that courts "should not become embroiled in attempting to ascertain [a State's] true motive." *Id.* at 216. Second, the district court mistakenly held that when statements by individual legislators and non-legislators suggest an impermissible motive, the burden of persuasion shifts to the State "to establish that the same decision would have resulted from the other purposes motivating the legislature, had the impermissible purpose not been considered." (S.A. 68.) But this burden-shifting approach was drawn

from areas of law unrelated to preemption, and it is incompatible with the analysis set out in *PG&E*.

PG&E sets forth the analytical framework for determining whether a state law is preempted by the Atomic Energy Act because of the state law's purpose. In *PG&E*, the challenged California law imposed a moratorium on the construction of new nuclear power plants until federal authorities approved a means of permanently disposing of high-level nuclear waste. 461 U.S. at 198. As discussed above, radiological safety—that is, the safety of the equipment and procedures that produce nuclear power—is exclusively a federal matter. But other aspects of nuclear power regulation, including decisions about whether to build or license a nuclear power facility, are reserved to the States, so long as the State's decisions are not "grounded in safety concerns." *Id.* at 213.

The plaintiffs in *PG&E* argued that California's moratorium was preempted because it was "predicated on safety concerns." *Id.* at 204. They relied on the legislative history of the statute, particularly the ballot initiative that gave rise to it and companion provisions in California's "so-called nuclear laws." *Id.* at 215. But the Supreme Court

declined to rely on "these specific indicia of California's intent in enacting [the moratorium]." *Id.* at 216. The Court noted that "inquiry into legislative motive is often an unsatisfactory venture." *Id.* And the structure of Atomic Energy Act preemption—under which States are never required to authorize a given power plant, or to state their reasons for declining to authorize a facility—made it "particularly pointless" to examine the "true motive" behind any specific decision not to authorize a facility. *Id.* The Supreme Court thus held that it "should not become embroiled in attempting to ascertain California's true motive." *Id.* Instead, the Court limited its analysis of legislative purpose to the question "whether there is a non-safety rationale for [the moratorium]." *Id.* at 213.

Applying these standards, the Court found that there was an adequate non-safety rationale for California's law. As an official California legislative committee report explained, the lack of a federally approved disposal method created a risk that "the nuclear waste problem could become critical leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors." *Id.* at 213-214. Declining the power companies' invitation to look behind this rationale

for the moratorium's "true motive," the Court "accept[ed] California's avowed economic purpose as the rationale for enacting [the moratorium]." *Id*. at 216.

The petitioners in *PG&E* raised the concern (also raised by the district court here) that if the Supreme Court declined to inquire into the true motive of the legislators, it would allow states to de-authorize nuclear power plants on an appropriate, but pretextual, purpose. The petitioners' brief ended with a warning that to uphold California's moratorium on the basis of its avowed rationale would "lead the Court to permit California to ban the development of nuclear energy by . . . 'simply publishing a legislative committee report articulating some state interest or policy other than frustration of the federal objective.'" Petitioners' Brief, *PG&E*, 1981 U.S. Briefs 1945, 1982 U.S. S. Ct. Briefs LEXIS 516, at *80 (Sept. 4, 1982), quoting *Perez v. Campbell*, 402 U.S. 637, 652 (1971). But the Supreme Court rejected this argument, finding it "pointless" to inquire into the real motive of any specific enactment when "the states have been allowed to retain authority over the need for electrical generating facilities"—an authority that is "easily sufficient to

permit a state so inclined to halt the construction of new nuclear plants by refusing on economic grounds" to authorize them. 461 U.S. at 216.

PG&E thus stands for the proposition that when a power company claims that a state law has an improper and preempted purpose, courts should determine whether there is "a non-safety rationale" for the challenged statute. 461 U.S. at 213, 216; *see County of Suffolk*, 728 F.2d 58, 60 (2d Cir. 1984). Once a court finds such a rationale, it should accept the avowed non-preempted purpose, rather than delving into the legislative history in search of the legislature's "true motive." *PG&E*, 461 U.S. at 216. The district court, however, did precisely the opposite of what *PG&E* requires. It first failed to find any evidence of preempted purpose in the statute itself—and then delved into the legislative history of Vermont's laws to determine the legislature's true motive.

1. When a statute has a legitimate, non-safety rationale, courts should not look to individual legislators' remarks for evidence of some other, improper 'true motive.'

The district court's first significant mistake was to look for evidence of preempted purpose not in the statutes themselves, but in comments by individual legislators during the process that led up to their passage. The district court's opinion acknowledges that Act 160

sets forth the purposes it serves, and, in doing so, invokes no preempted purpose: "The legislative policy and purposes expressed in Section One of Act 160 do not refer to preempted purposes for the Act." (S.A. 73.) The district court also found no evidence of preempted purpose elsewhere in the text of Act 160, Act 74, or in any other Vermont statute. Its discussion of Act 74's purpose never even refers to the text of the statute. (S.A. 79-82.) Rather, the district court's evidence of preempted purpose consists entirely of statements by individual legislators, and even non-legislators, who participated in the legislative process. (S.A. 73-82.) Many of these remarks were followed by comments from other legislators or participants who reminded their colleagues that nuclear safety was not a subject on which the State could base its decisions. (*See, e.g.*, S.A. 26.) And none of them purported to represent the collective understanding of the drafters.

Indeed, the only passage from legislative history cited by the district court that arguably reflects the collective understanding of the drafters points to a non-preempted purpose. A senator speaking on behalf of the Committee on Finance clarified Act 160's purpose on the Senate floor by stating that "this bill is not about the safety of nuclear

fission." (S.A. 31.) Rather, given that the volatility of the relevant energy markets, the drafters believed it was important not to commit Vermont to re-authorizing the Entergy facility after 2012, because economic and energy-planning considerations might point in favor of other power sources in the near future. (S.A. 31-32.)

To be sure, reliance on *appropriate* portions of a challenged statute's legislative history can help illuminate its purpose if the purpose is not evident from the statute itself. *PG&E*, for example, discussed a legislative committee report that accompanied California's moratorium bill. *PG&E*, 461 U.S. at 213. But, as the Supreme Court has warned, legislative purpose should be inferred only from documents that "represent the considered and collective understanding of those [legislators] involved in drafting and studying the proposed legislation)." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quotations and alterations omitted)

Without exception, every piece of evidence cited by the district court in *support* of its finding of preempted purpose is a statement by an individual legislator, or even a non-legislator testifying at a hearing. (S.A. 73-78.) But it is equally well-established that the statements of

individual legislators are of dubious authority. *See Zuber v. Allen*, 396 U.S. 168, 186 (1969); *Garcia*, 469 US at 76. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). Indeed, this Court has explained that statements by individual legislators are "of little value even in construing ambiguous statutes." *In re Methyl Tertiary Butyl Ether ("MTBE")*, 488 F.3d 112, 127 (2d Cir. 2007). If an issue "does not turn on the construction of statutory language," but rather on "what Congress as a whole understood would be the practical consequences of the statute it was discussing," statements by individual legislators simply "do not constitute competent evidence." *Id.*

In this case, the district court found nothing in the challenged Vermont statutes themselves that suggested a preempted purpose, and it did not even hold that the statutes were ambiguous on this point. Rather, it relied on individual legislators' statements as evidence of the practical concerns that supposedly motivated Vermont's legislature. That is precisely the kind of question on which individual legislators' statements are not "competent evidence." *Id.*

The district court relied on two cases from this Court to support its exclusive reliance on individual legislators' remarks: *Greater New York Metropolitan Food Council v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538-39 (2001); and *Vango Media v. City of New York*, 34 F.3d 68, 74-75 (1994). (S.A. 66.) Those cases dealt with a federal law that preempts state requirements "with respect to the advertising or promotion of any cigarettes" when those requirements are "based on smoking and health." 15 U.S.C. § 1334(b). Neither case dealt with Atomic Energy Act preemption, and so neither case was subject to the rule of *PG&E*, under which courts should not look behind a statute's avowed purpose to discern the legislature's true motive.[4]

Nor do the tobacco preemption cases—even if applicable here—support the district court's use of individual legislators' remarks to determine the true motive behind Vermont's statutes. When this Court said in *Greater New York* that it "do[es] not blindly accept the

[4] It may also be significant that the laws under analysis in those cases were both city ordinances rather than state laws. *See Cine 42nd Street Theater Corp. v. Nederlander*, 790 F.2d 1032, 1042 (2d Cir. 1986) ("Although municipalities are state subdivisions, they do not enjoy the deference due a state as sovereign.").

articulated purpose of an ordinance for preemption purposes," 195 F.3d at 108, it simply meant that it would not limit its analysis to the "declaration of intent" preceding the substantive provisions of a statute; instead, it would—as courts always do—consider "the purpose of the ordinance as a whole." *Id*. Similarly, *Vango Media* simply makes clear that when a court considers a declaration of legislative intent, it must consider "the *entire* declaration of legislative findings and intent." *Vango Media,* 34 F.3d at 73 (emphasis added). In other words, *Greater New York* and *Vango Media* stand for the proposition that courts should analyze the entire challenged statute—not for the proposition that individual legislators' remarks can invalidate an otherwise-appropriate law.[5]

[5] *Greater New York* does refer to comments made at a city council hearing about the challenged law's purpose. 195 F.3d at 108 n.1. But that footnote is appended to a passage that relies mainly on the text of "the law itself," which "provides extensive discussion" of the safety issues that are reserved exclusively for federal authorities. *Id*. In this case, by contrast, the district court's discussion of preempted purpose provides no comparable analysis of Vermont's laws themselves.

2. The district court should not have applied *Mt. Healthy*'s burden-shifting framework to a preemption case.

The district court's opinion makes clear that the basic framework it applied was drawn not from Atomic Energy Act preemption cases, or even from preemption cases under other federal statutes, but from a wholly unrelated area of the law. Rather than applying the presumption against preemption required under *PG&E*, the court applied a burden-shifting framework drawn primarily from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Mt. Healthy* addresses cases in which the plaintiff establishes that he engaged in conduct protected by the First Amendment, and that this conduct was a "substantial" or "motivating" factor in the defendant's decision to take an adverse action against him. *Id.* at 286. In such a case, the burden shifts to the defendants to establish that they "would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 286.

The district court cited no case applying *Mt. Healthy*'s burden-shifting framework in a preemption context. Nor, indeed, did it cite precedent applying *any* burden-shifting framework in a preemption

context. Shifting the burden to the defendants in a preemption case like this one is inconsistent with the basic principle that in areas of traditional state authority, including regulation of utilities, it is the State, not the plaintiffs, who benefit from a presumption. *PG&E*, 461 U.S. at 206.

Moreover, the Supreme Court has cautioned against inquiries that try to identify the "primary" purpose of a statute, as the district court's analysis did. "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Thus, any "search for the 'actual' or 'primary' purpose of a statute is likely to be elusive." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981). This makes it particularly important to follow the rule of *PG&E*, which directs courts simply to look for "*a* non-safety rationale," 461 U.S. at 213 (emphasis added), rather than trying to determine the primary rationale for a statute. The district court ignored these principles when

it held that "radiological safety concerns were the primary motivating force" behind the challenged laws. (S.A. 81.)

Under *PG&E*, the question presented by claims that a state law was enacted for a purpose forbidden by the AEA is simply whether there is "a non-safety rationale" in the statute itself. The district court erred when it replaced this analysis with a novel and unsupported framework in which statements by individual legislators can shift the burden of persuasion to the State to show that the legislature would have passed the same statute in the absence of concerns about nuclear safety.

B. The District Court Also Erred in Analyzing the Effects of Vermont's Laws

The district court's decision to investigate the true motive behind Vermont's laws was apparently based, in part, on its view that the "effects" of Vermont's statutes are troubling. (S.A. 71-73; S.A. 78-79.) Although the district court did not hold that Vermont's laws are preempted on the basis of their effects, it suggested that the effects of the laws are troubling, and cited this as a reason for investigating the

true purpose of the laws.[6] But its analysis of the effects of Vermont's laws is misguided, for two reasons. First, the district court failed to apply the standards set forth in *English*, the case that explains when the effects of a State law give rise to preemption concerns under the Atomic Energy Act. Second, the district court mistakenly reasoned that states infringe on federal authority when they make it possible for a future state legislature to allow a nuclear facility's authorization to expire without providing any statement of findings or reasons. But any sunset provision in a facility's authorization allows the authorization to expire without any further statement of findings. And the view that sunset provisions are inherently troubling from a preemption perspective is inconsistent with the Supreme Court's repeated affirmations of States' authority not to re-authorize nuclear power plants.

[6] The district court's analyses of Acts 160 and 74 each contain a sub-section entitled "Effect Apparent From Legislative Text." (S.A. 71, 78.) Each sub-section finds an aspect of Vermont's statutes to be cause for concern, and cites these concerns as reason for inquiring into the true motive or purpose that motivated Vermont's legislature. (S.A. 73, 79.)

1. The effects of state laws relating to nuclear power plants do not give rise to AEA preemption unless they substantially and directly affect decisions about nuclear safety.

The standards for analyzing the question whether a law has preempted effects under the Atomic Energy Act are set forth in *English v. General Electric*, 496 U.S. 72 (1990), which addressed a claim that the Atomic Energy Act preempted an award of tort remedies against a nuclear-fuels production facility. *Id.* at 74. Because the state law in question was a law of general applicability, it was clear that it had not been motivated by concerns about nuclear safety; there was no question of preempted purpose. *Id.* at 85. The question presented, therefore, was whether the plaintiff's tort claim was, by virtue of its effects, "so related to the radiological safety aspects involved in the operation of a nuclear facility that it falls within the preempted field." *Id.* at 85 (quotations and alterations omitted). *English* held that in analyzing claims that a state law is preempted by virtue of its effects, rather than its purposes, courts must analyze whether the challenged state law or application of state law has "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* at 85.

The district court did not apply this standard in its analysis of the "effects" of Vermont's laws. (S.A. 71-73; S.A. 78-79.) In its discussion of the governing law, the district court mentioned *English*, but described it inaccurately. (S.A. 70.) The district court stated that the tort claims in *English* would have been preempted if there were "a strong showing that the tort claims at issue had a 'direct and substantial effect' on radiological safety." (S.A. 70.) But this formulation suggests a much more skeptical analysis of state laws than the one *English* envisioned. *English* requires the court to examine whether the challenged statute would have a "direct and substantial effect *on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels*." *English*, 496 U.S. at 85 (emphasis added). The district court's discussion of the effects of Vermont's statutes makes no effort to connect them to decisions about radiological safety by nuclear-plant operators. This error is significant, because some state laws may affect radiological safety without affecting decisions by the builders and operators of nuclear plants concerning radiological safety levels. Moreover, some laws may affect those decisions in a way too indirect or

insubstantial to give rise to preemption—as was the case in *English* itself.

English observed that "not every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field." *Id.* at 85. The Court had "no doubt" that the application of state minimum wage laws and child labor laws to nuclear facilities would not be pre-empted. *Id.* Nor, importantly, was the tort claim at issue in *English* preempted. The plaintiff had sued for intentional infliction of emotional distress, alleging that her supervisors retaliated against her for calling attention to violations of nuclear safety standards at the facility where they worked. *Id.* at 75. *English* recognized that claims of this kind would "have some effect on these decisions" about nuclear safety, because liability on such claims would raise the cost of certain kinds of conduct: "As employers find retaliation more costly, they will be forced to deal with complaints by whistle-blowers by other means, including altering radiological safety policies." *Id.* But "this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field." *Id.* The district court's discussion of allegedly

preempted effects did not even attempt to identify such effects on decisions about radiological safety.

2. The Atomic Energy Act does not bar states from including sunset provisions when they authorize the operation of nuclear power plants.

Instead of applying the analysis set forth in *English*, the district court seemed to hold that Vermont's laws are preempted because they may make it possible for the State, in the future, "to allow Entergy's current [certificate of public good] to lapse and effectively deny a pending petition for renewal, even if it does so for reasons preempted under federal law." (S.A. 71-72.) This conclusion, if endorsed by this Court, would undermine the "dual regulation" structure of state and federal authority under the Atomic Energy Act, because it would prohibit states from including a sunset provision in any law authorizing the operation of a nuclear power plant.

The district court suggested that Act 160 is preempted because it "requires the passage of a special law affirmatively approving continued operation." (S.A. 71.) But this would be true of any authorization that contains a sunset provision. Unless a State issues a license for a nuclear power plant to operate in perpetuity, States always retain the authority

to terminate the operation of a facility through inaction. *See PG&E*, 461 U.S. at 207 (holding that the federal government lacks "authority over the generation of electricity itself, or over the economic question whether a particular plant should be built."). Indeed, this is why *PG&E* found it "particularly pointless" to inquire into the "true motive" behind California's moratorium on new nuclear power plants: since States always retain the power to decline re-authorization of a facility—and since most authorizations are not permanent—it is always possible for States to allow an authorization to lapse through inaction, and thus to effectively de-authorize the facility without explaining its reasons. *PG&E*, 461 U.S. at 216.

Because the States retain the right to deny authorization to a facility, de-authorization alone—or the power to de-authorize without reasons—is not the kind of "effect" that can be the basis for preemption under the Act. Of course, if a statute revoking authorization makes clear that the purpose of the revocation is to guard against radiological safety hazards at the facility, then the statute will be subject to the analysis of preempted purposes set forth in *PG&E*. Similarly, if an agency denies a certificate of public good, preempted-purpose analysis

applies. But the denial of authorization itself, or the power to deny authorization, cannot be an effect that triggers preemption.

The district court seemed to consider the States' power to deny recertification without giving a reason antithetical to the division of federal and state powers set up by the Act. But it is, on the contrary, a necessary implication of *PG&E*'s holding—and an implication of which the Supreme Court was well aware. "Even a brief perusal of the Atomic Energy Act reveals that, despite its comprehensiveness, it does not at any point expressly require the States to construct or authorize nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors." *PG&E*, 461 U.S. at 205. Just as the States are not required to approve new construction, they are not required to re-authorize the operation of a nuclear facility, or to give reasons for failing to do so. All *PG&E* requires is that when the states regulate nuclear power facilities, they provide an adequate "non-safety rationale" for doing so. 461 U.S. at 213.

The district court's approach misapplies both the precedents that apply to preempted-purpose claims and the precedents that apply to

claims of preempted effects. Its approach to each of these questions, if adopted by this Court, would undermine the carefully delineated division of state and federal powers recognized by the Supreme Court in *PG&E* and *English*. This Court should reject the district court's analysis.

CONCLUSION

For the foregoing reasons, this Court should reject the district court's preemption analysis.

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